

# **EXHIBIT N**

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NIKE, INC.,

Plaintiff,

vs.

CASE NO. 1:22-CV-00983-VEC

STOCKX LLC,

Defendant.

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VIDEOTAPED DEPOSITION OF ITAMAR SIMONSON, Ph.D  
San Francisco, California  
Tuesday, July 25, 2023

Stenographically Reported by: Ashley Soevyn,

CSR No. 12019

Job No. 6001088

Pages 1 - 284

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Videotaped Deposition of  
ITAMAR SIMONSON, PH.D., taken on behalf of the  
Defendant StockX, LLC,, Pursuant to Notice, at the  
offices of Debevoise & Plimpton, 650 California  
Street, San Francisco, California beginning at  
9:07 a.m. and ending at 5:10 p.m. on Tuesday, July  
25, 2023, before me, ASHLEY SOEVYN, Certified  
Shorthand Reporter No. 12019.

1 names."

2 I'm not sure that captures everything,  
3 but that's one definition.

4 Q Are there other aspects to the definition  
5 of a brand extension that aren't included in that  
6 paragraph 7?

7 MS. DUVDEVANI: Objection.

8 THE WITNESS: You know, there -- you --  
9 you open a marketing textbook, you open a branding  
10 textbook, you'll find different definitions. I  
11 don't think there is one -- one definition that  
12 everyone agrees on.

13 BY MR. FORD:

14 Q And your opinion is that the Vault NFTs  
15 in this case constituted a brand extension of the  
16 Nike brand; is that right?

17 A Yes. As far as Nike is concerned. It  
18 might have been brand extension for other brands as  
19 well.

20 Q Is whether the Vault NFTs are or are not  
21 a brand extension relevant to consumers' likelihood  
22 of confusion in this case?

23 A I don't -- I haven't thought about that.  
24 I don't know that it is.

25 Q In addition in your first rebuttal

1 report, you mention risk of harm. For example, in  
2 paragraph 11, right?

3 A Right.

4 Q You write:

5 (As read):

6 "StockX's unauthorized use of Nike's  
7 brand to experiment with a new product  
8 category presented exactly such a risk  
9 of unarmed harm to Nike's brand and its  
10 good will."

11 Correct?

12 A Right.

13 Q In this report or otherwise, do you have  
14 any other evidence that there was, in fact, harm to  
15 Nike as a result of StockX's Vault NFTs?

16 A I was --

17 MS. DUVDEVANI: Objection.

18 THE WITNESS: Yeah. I -- I was not asked  
19 to opine to quantify any damages to Nike.

20 Having said that, the mere fact that Nike  
21 is losing control of its brand, that's harm. At  
22 least, potential harm. Let's -- and it's not --  
23 it's easy -- let me put it this way: It's easy to  
24 think about scenarios whereby Nike's brand would  
25 be -- would have been damaged -- and again, I'm not

1 opining on specific damages -- we're talking about a  
2 new category and new idea that StockX came up with.

3 And we know that initially, the prices  
4 that people paid for those shoes, Nike shoes, were  
5 extremely high. Now, suppose that a customer  
6 purchased an overpriced, let's call it Nike shoe,  
7 and that -- that person has a press conference and  
8 nowadays with social media, it's very easy to say,  
9 "I trusted Nike, and I was willing to go along with  
10 this seemingly attractive offer of StockX to invest  
11 in Nike -- in a NFT tied to a Nike shoe because I'm  
12 a great believer in Nike. It turns out I lost  
13 \$5,000," or whatever.

14 I don't think it's the kind of  
15 association that Nike would like to have.

16 BY MR. FORD:

17 Q Does Nike have the right to set prices  
18 for its shoes on the secondary market?

19 MS. DUVDEVANI: Objection.

20 THE WITNESS: I -- I don't think so.

21 BY MR. FORD:

22 Q So you're not offering an opinion on  
23 whether there was, in fact, actual harm to Nike in  
24 this case, correct?

25 A As I said, I'm not the damages person

1 here. Didn't quantify, didn't offer. I'm saying  
2 the mere fact that you lose control over your brand,  
3 especially in the context of such a risky novel  
4 category, where the rules are not set yet, and hard  
5 to predict what will happen. We know that NFTs have  
6 been on the decline. They may go back up. So there  
7 is real risk here. And if -- if I'm the brand  
8 owner, I don't want to be at the mercy of someone  
9 else who is using my product in the context of this  
10 novel, perhaps untested, business idea.

11 Q You call this a novel business idea. But  
12 elsewhere in your first rebuttal report -- I believe  
13 it's your first rebuttal report. Yes.

14 Paragraph 6 on page 2, you note that Nike  
15 had also entered the NFT space, correct?

16 A Yes.

17 Q And so it's your understanding that Nike  
18 also sells NFTs to consumers?

19 A Yes. Nike decided for itself to sell  
20 sneakers as NFT. Obviously, Nike does not need to  
21 make a big deal out of authenti -- authentication,  
22 given it is the -- the company that makes those  
23 shoes, and they can -- if they say 100 percent  
24 authentic, they can -- they can say it with  
25 100 percent certainty.

1 survey work you did in your -- that's set out in  
2 your opening report?

3 A I -- I think it is. We already talked  
4 about the other component, which turned out to be so  
5 clear and one-sided that is that most people believe  
6 it is Nike that makes the offer, rather than StockX.  
7 That those -- that was another -- another main  
8 component. And I think, if I recall correctly,  
9 Dr. Neal, in his rebuttal report, indeed identified  
10 these two components. I think -- I don't remember  
11 the exact wording, had something to do with  
12 prominence and something to do with the ratio of  
13 mentions of Nike and StockX.

14 Q Is the component of -- which you say  
15 turned out to be so clear, that most people believe  
16 it is Nike that makes the offer rather than StockX,  
17 the likelihood of confusion component?

18 A In this context, it is.

19 Q What's the difference between a  
20 likelihood of trademark confusion survey and a  
21 traditional likelihood of trademark confusion  
22 survey?

23 MS. DUVDEVANI: Objection.

24 THE WITNESS: I -- we just discussed the  
25 likelihood of confusion survey I did here, plus the



1 test of the impact of prominence. Traditional  
2 likelihood of -- of confusion survey, let's stay in  
3 the domain of ketchup, I show you Heinz ketchup, and  
4 I ask you which companies makes this product, other  
5 products, affiliation, permission, all the sort of  
6 normal questions. Or if you decide to use a  
7 different format, you may ask different questions.

8 That is what I would call traditional  
9 likelihood of confusion survey where, when you  
10 answer the questions, you see the allegedly  
11 infringing mark, but they're not side by side  
12 together.

13 BY MR. FORD:

14 Q And is another word for that kind of  
15 survey that you just described an Eveready survey?

16 A It could be a Squirt. There are  
17 different methodologies. Squirt would be a  
18 different sort of survey that would also fall in the  
19 category of traditional likelihood of confusion  
20 surveys. I've used, in recent times, a variation of  
21 these two. I think it's -- has been called aided  
22 Eveready. So there are other methods and other  
23 modifications of the two classic formats.

24 But when I'm talking about traditional  
25 likelihood of confusion survey, it's a situation

1 where you see one mark, let's say in the forward  
2 confusion case, the allegedly infringing mark, and  
3 you ask a series of questions.

4 And it may -- what I just may not include  
5 Squirt, but -- but yeah, you get -- I think you get  
6 the idea.

7 Q I think you understood exactly where I  
8 was going to go.

9 So is another word for the kind of survey  
10 you're describing where the respondent only sees one  
11 mark an Eveready survey?

12 A You mean classic Eveready? You see one  
13 mark, yes.

14 Q And is it your opinion, as I understand  
15 it, that you did not do an Eveready survey in this  
16 case?

17 A I did a -- you can call it a modified  
18 Eveready, given the context of this particular case.

19 Q In what way did you modify the  
20 traditional Eveready survey, given the context of  
21 this case?

22 A I showed stimuli that placed both marks  
23 at issue together throughout the questionnaire.  
24 Respondents saw the two above each question.

25 That's a modification. It's just

1 reality. That's the marketplace. That's how StockX  
2 offered its NFTs.

3 Q And that would be a modification to the  
4 nature of the stimulus; is that right?

5 A That would be a modification to the  
6 stimuli. It also has implications for the questions  
7 and how you analyze the answers. And I think I  
8 discussed it in my report.

9 Q Yeah. And we'll get to that.  
10 Did you modify the questions you asked in  
11 any way from the traditional Eveready survey?

12 A I think some minor wording changes. We  
13 already talked about the product/NFT. It might have  
14 been different. But I think Eveready, as well as  
15 Squirt, have been modified in all kinds of ways  
16 depending on a particular case and context.

17 Q And I'm -- I just want to focus on this  
18 case and this context.

19 Other than modifying the questions to say  
20 product/NFTs, did you modify the traditional  
21 Eveready questions in any other way in this case?

22 A As I explained -- and you said we'll talk  
23 about it later, but I have to explain it now.

24 The meaning of the later questions that  
25 are following the -- were following the Eveready

1 proper universe in this case is all prospective  
2 customers of anything StockX offers or just  
3 prospective customers of the Vault NFT product?

4 A I focused on the Vault NFT.

5 Q So it's your opinion that the proper  
6 universe in this case is limited to prospective  
7 customers of the Vault NFT product?

8 MS. DUVDEVANI: Objection.

9 THE WITNESS: People whose  
10 characteristics are such that they're more likely  
11 than most people to consider buying an NFT offered  
12 by StockX.

13 BY MR. FORD:

14 Q Any NFT?

15 A Especially sneakers.

16 Q Especially an NFT associated with  
17 sneakers; is that what you're saying?

18 A I think that -- well, I also included  
19 people -- I said people who collect sneakers, they  
20 may be interested in buying a -- an NFT that  
21 involved a sneaker which could serve as part of  
22 their collection even if they don't know yet exactly  
23 what they'll do. So people who are into crypto  
24 currency, apparently these are people who are into  
25 those kind of investments.

1 and were part of the data that you relied on in this  
2 opinion -- or in your opinion did not select  
3 number 2, investing in NFT?

4 A I -- I don't recall.

5 Q So you -- you represented that you  
6 reviewed Dr. Neal's expert report in this case --  
7 right? -- his rebuttal expert report.

8 A I did.

9 Q And do you recall that Dr. Neal  
10 calculated, based on your data, that 52.2 percent of  
11 your respondents did not select number 2?

12 A Yes.

13 Q Do you have any reason to disagree or  
14 contest Dr. Neal's findings there?

15 A No.

16 Q Okay. You didn't ask your respondents  
17 anything specific to buying collectible sneakers in  
18 particular, correct?

19 MS. DUVDEVANI: Objection.

20 THE WITNESS: I -- I did not --

21 BY MR. FORD:

22 Q Let -- let me withdraw, and I'll ask the  
23 question a different way.

24 Based on your screening questions, are  
25 you able to determine whether any of your survey

1 respondents was specifically interested in buying  
2 collectible sneakers?

3 A Not -- not with the certainty. As I  
4 said, I'm looking for all kinds of indicators that  
5 make it more likely. And I explain in my reports  
6 why defining it narrowly based on purchases of NFTs  
7 tied to sneakers was a mistake. And you -- I'm sure  
8 you read all the problems that arose.

9 And I did not even talk about the fact  
10 that I think Dr. Neal found extremely high  
11 percentage of people who said that they purchased  
12 NFT and that they collect sneakers. I mean, in any  
13 case -- and -- and the fact that he, in his survey,  
14 I think, something like 7 percent said that they  
15 either purchased NFTs linked to sneakers or expect  
16 to. So if -- if I'm 7 percent, yet he's concerned  
17 about the fact that, in my survey, 52 percent said  
18 they didn't -- I mean, I -- anyway. It's going  
19 beyond your question.

20 But, yeah. That's -- that's -- you're  
21 right. You -- it's not easy to define here the  
22 exact universe. And I think, as I explained in my  
23 reports, realistically, consumers even who are  
24 inclined to start collecting sneakers or invest in  
25 something like these NFTs, they might know right

1 BY MR. FORD:

2 Q Okay. The -- your conclusion that the  
3 data here was not -- just going to make sure  
4 "informative" was the word that you used. Did you  
5 reach that conclusion before looking at the  
6 responses that your respondents gave?

7 A Yes.

8 Q Did you, in fact, look at any of the  
9 responses that your respondents gave?

10 A I -- I don't recall specifically that --  
11 I -- I -- I probably did. But I -- I don't remember  
12 exactly what I looked at and whether any conclusions  
13 or any findings seemed relevant.

14 Q Did reviewing the data in any way affect  
15 the opinions that you're offering in this case?

16 A Absolutely not.

17 Q Great.

18 Who coded your data?

19 A There -- there is a firm working with  
20 Target Research Group. These are people who  
21 specialize in coding. And they are blind to both  
22 the purpose of the survey and the identity of its  
23 sponsor. They just look at the responses and code  
24 the verbatims.

25 Q Did you personally review their coding?

1 Mary Kay report.

2 Are you with me?

3 A I'm with you.

4 Q Okay. The first sentence here write --  
5 you write:

6 (As read) :

7 "As explained above, considering that  
8 most consumers are not legal experts  
9 and cannot be expected to be familiar  
10 with the first sale doctrine, it is  
11 doubtful that any consumer survey would  
12 be capable of providing potentially  
13 pertinent information."

14 Did I read that correctly?

15 A You did.

16 Q Is it still your understanding today that  
17 most consumers are not legal experts?

18 A It -- it is.

19 Q Is it still your understanding today that  
20 most consumers cannot be expected to be familiar  
21 with the first sale doctrine?

22 A Yes.

23 Q Let's turn to page -- sorry -- paragraph  
24 34.

25 Are you with me?



1 THE WITNESS: As you recall, in my  
2 report, I emphasized the question about who -- who  
3 makes the offer -- the offer. You remember the page  
4 with StockX NFT -- Vault NFT, who makes the offer.  
5 That was the question that I most relied on. And  
6 that was the -- the only question, really, that I  
7 relied on with respect to the question of origin.  
8 And I thought that that's completely different.  
9 Obviously, it's not the affiliation question.

10 And I think I made that point in the  
11 report where it said given that the names Nike and  
12 StockX are on every page, you'd expect most people  
13 to mention them sooner or later.

14 BY MR. FORD:

15 Q Did you consider showing your survey  
16 respondents the first sale doctrine?

17 A No.

18 Q Did you consider explaining anything  
19 about the first sale doctrine to your survey  
20 respondents?

21 A No. It would be completely improper  
22 in -- in the context of this case.

23 MR. FORD: All right. Let's go off the  
24 record. I think I'm probably either done or almost  
25 done, but I just want to make sure.